

MARILYN B. GUNNER, ESQ. SB# 149540  
P.O. Box 605  
La Mesa, Ca. 91944-0605  
Telephone: (619) 461-8716  
Fax: (619) 461-6795

Attorney for Material Witnesses

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,	)	Criminal Case No. 08cr0611 JM
	)	Magistrate No: 08mj8148 PCL
Plaintiff,	)	
	)	
v.	)	NOTICE OF MOTION; MOTION FOR
	)	VIDEOTAPE DEPOSITION
SERGIO ANGEL DIAZ (1),	)	AND RELEASE OF MATERIAL
JASMINE MARIE AYALA (2),	)	WITNESSES
	)	Hearing Date: February 1, 2008
Defendants.	)	Time: 1:30 p.m.
	)	Judge: Lewis

TO KAREN P. HEWITT, UNITED STATES ATTORNEY, ALESSANDRA P. SERANO,  
ASSISTANT UNITED STATES ATTORNEY, BRIAN J. WHITE, ATTORNEY FOR  
DEFENDANT SERGIO ANGEL DIAZ, and SHAUN KHOYAYAN, ATTORNEY FOR  
DEFENDANT JASMINE MARIE AYALA:

PLEASE TAKE NOTICE that on February 1, 2008 at 1:30 p.m.,  
counsel will move this court for an order to take the deposition of  
Material Witnesses ADOLFO VARGAS-GUTIERREZ, ("MR. VARGAS"), JESUS  
ANTONIO VILLANUEVA-GUTIERREZ, ("MR. VILLANUEVA"), and JOSE LUIS  
ESTRADA-VASQUEZ ("MR. ESTRADA"), collectively the "Material  
Witnesses".

**MOTION**

The Material Witnesses, through their counsel, MARILYN B.  
GUNNER, and pursuant to Fed. R. Crim. P. Rule 15, 8 U.S.C. Section  
1324 (d), 18 U.S.C. Section 3144, and 18 U.S.C. Section 3142, hereby  
move this court for an order to take their deposition by videotape.

1 In support of this request, the Material Witnesses submit the  
2 following Memorandum of Points and Authorities in Support of Motion  
3 for Videotape Deposition and Release of Material Witnesses,  
4 identified here as "Attachment A" and incorporated herein by  
5 reference, the records in the above-entitled case and all matters  
6 submitted to the court prior to the determination of this motion.

7  
8 Dated: March 16, 2008

S/ MARILYN B. GUNNER

Attorney for Material Witnesses

E-MAIL: mgunnner@cox.net

1 US v. DIAZ, et.al.  
08mj8148 PCL; 08cr0611 JM

3 ATTACHMENT A

4 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR  
5 VIDEOTAPE DEPOSITION AND RELEASE OF MATERIAL WITNESSES

6 **STATEMENT OF FACTS**

7 The Material Witnesses were detained on February 16, 2008. They  
8 were found inside a travel trailer driven by Defendant DIAZ, along  
9 with 10 others who were determined to be here illegally. Defendant  
10 AYALA was a passenger in the trailer driven by DIAZ.

11 On March 4, 2008, both Defendants were Indicted on three counts  
12 of violation of Title 18, U.S.C. § 1324(a)(1)(A)(ii) and (v)(II) -  
13 Transportation of Illegal Aliens and Aiding and Abetting.

14 As of the date of this motion, none of these Material Witnesses  
15 have been able to find someone who will sign a bond on their behalf.  
16 Ongoing efforts are being made to find sureties. As of the date of  
17 this Motion, the Witnesses will have been in custody nearly 6 weeks.

18 MR. VARGAS has no prospects of obtaining a surety. In Mexico,  
19 he supports his Mother who is ill. He has equivalent to a 6th grade  
20 education, and was coming to the United States to work, in order to  
21 help support her. Requiring him to stay in custody constitutes a  
22 severe economic and emotional hardship for him and his family.

23 MR. VILLANUEVA recently lost his Mother, and is working to  
24 support his elderly father in Mexico. He has equivalent to a 9th  
25 grade education. Requiring him to stay in custody also creates an  
26 economic and emotional hardship for his father, who depends on him.

27 MR. ESTRADA supports 3 children in Mexico, ages 11 months, 4  
28 years and 6 years, and has equivalent of a 9<sup>th</sup> grade education.

1 Keeping him in custody while the case is pending constitutes severe  
2 economic and emotional hardship for his children.

3 Besides the economic and emotional hardship, each Material  
4 Witnesses' loss of freedom from being incarcerated, while not charged  
5 with any crime, constitutes extraordinary circumstances which require  
6 granting this Motion to achieve their release.

7 **THE TESTIMONY OF THE MATERIAL WITNESSES CAN BE SECURED BY**  
8 **VIDEOTAPE DEPOSITIONS AND THERE IS NO COMPELLING REASON TO KEEP**  
9 **THEM IN CUSTODY.**

10 Depositions of material witnesses may be used at trial in  
11 criminal cases, so it is only in exceptional circumstances, where the  
12 interests of justice will be denied, that a videotape deposition is  
13 not appropriate. [See IIRIRA § 219 (admissibility of videotape  
14 depositions); see also, United States v. King 552 F.2d 933 (9<sup>th</sup> Cir.  
15 1976) (cert. denied, 430 U.S. 966).] The defendant, who is ordered to  
16 be present with his counsel at the videotape depositions, has a full  
17 and fair opportunity to cross-examine the witnesses. The videotape  
18 provides sufficient indicia of reliability to afford the trier of fact  
19 a satisfactory basis for evaluating the truth of a statement. [Dutton  
20 v. Evans, 400 U.S. 74,89 (1970).]

21 The burden is on the objecting party to show that the use of the  
22 deposition testimony will deny the defendant a fair trial and that the  
23 live testimony would somehow be significantly different than that  
24 taken at the deposition. [United States v. Humberto Rivera, 859 F.2d  
25 1294, 1208 (4<sup>th</sup> Cir. 1988).]

26 In Torres-Ruiz v. United States, 120 F.3d. 933, (9th Cir.  
27 1997), the Ninth Circuit mandated the use of videotape depositions  
28 when the Material Witnesses' testimony can be adequately secured by  
deposition and further detention is not necessary to prevent the

1 failure of justice. (emphasis added; see 18 U.S.C. § 3144) In  
2 Torres-Ruiz, a routine alien smuggling case, the witnesses were  
3 sole support of their families in Mexico, and their continued  
4 incarceration constituted a hardship on them and their families in  
5 Mexico, who depended on them for support. The Torres-Ruiz Court  
6 clarified that denial of a motion to videotape the witness'  
7 testimony is limited to situations in which a "failure of justice"  
8 would occur because the deposition would not serve as an adequate  
9 substitute for the witness' live testimony.

10 As of the date of this Motion, the Material Witnesses have  
11 been in custody almost two months, although not charged with a  
12 crime. Continued incarceration constitutes severe economic and  
13 emotional hardship for them and their families who depend on them  
14 for financial support. It is not necessary to continue to detain  
15 them, because no failure of justice would occur by videotaping  
16 their testimony. Their testimony can be adequately secured by  
17 granting this Motion, and there has been no showing that the  
18 deposition testimony would be different from the live testimony.  
19 Further, they are subject to the subpoena power of this Court.

20 Therefore, it is requested the Court grant this Motion and  
21 order the videotape depositions of the Material Witnesses to occur  
22 forthwith. The Material Witnesses also request the Court order  
23 their immediate release upon conclusion of the depositions.

24  
25 DATED: March 16, 2008

S/ MARILYN B. GUNNER  
Attorney for Material Witnesses,  
E-MAIL: mgunner@cox.net